A

FORDECO SDN BHD v. PK FERTILIZERS SDN BHD

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
RAMLY ALI FCJ
ROHANA YUSUF FCJ
B MOHD ZAWAWI SALLEH FCJ
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 02(f)-50-08-2016(S)]
9 JULY 2019

C ***MARITIME LAW:*** *Carriage of goods – Vessel ran aground and effectively stranded – Appellant agreed to hire barge ('Hathaway') to vessel owners to assist grounded vessel – Tons of rock phosphate cargo discharged on Hathaway to help lighten cargo on vessel – Hathaway proceeded to Lahad Datu and discharged cargo – Cargo found to be damaged – Cargo owners suffered losses and damages – Claim brought against*
D *appellant in bailment/tort of negligence – Whether appellant sub-bailee of cargo and under duty to deliver cargo in same condition in which it was first offloaded – Whether Hathaway's part in operation amounted to bailment contract as it arose in context of normal carriage of goods – Whether contract entered into between vessel owners and appellant a salvage contract rather than one of towage and carriage*
E *of goods in ordinary sense – Aldora test – Whether applicable – Whether courts slow to impute negligence to salvor who acted reasonably and in interests of parties – Whether cargo owner bound by or deemed to have agreed to terms and conditions of salvage operation as agreed to by vessel owner – Whether standard of care different from that in normal carriage of goods situation where principles of bailment and*
F *negligence would be applied strictly*

TORT: *Negligence – Carriage of goods – Vessel ran aground and effectively stranded – Appellant agreed to hire barge ('Hathaway') to vessel owners to assist grounded vessel – Tons of rock phosphate cargo discharged on Hathaway to help lighten cargo on vessel – Hathaway proceeded to Lahad Datu and discharged cargo – Cargo found*
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H *vessel owners and appellant a salvage contract rather than one of towage and carriage of goods in ordinary sense – Aldora test – Whether applicable – Whether courts slow to impute negligence to salvor who acted reasonably and in interests of parties – Whether cargo owner bound by or deemed to have agreed to terms and conditions of salvage operation as agreed to by vessel owner – Whether standard of care different from that in normal carriage of goods situation where principles of bailment and*
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On 2 February 2006, a vessel named 'Thor Traveller'('the vessel'), on a voyage from Ain Sukhna, Egypt to Lahad Datu, Sabah, carrying a cargo of about 22,000 metric tonnes of rock phosphate in bulk, ran aground in high seas that were rough, off the north east coast of Sabah. It was trapped in coral rocks and was effectively stranded. Both the vessel and the cargo were in peril. The cargo was owned by the cargo owners, PK Fertilizers ('respondent'). The mode of rescuing the stranded vessel was to lighten it, so that it could be refloated, and continue on its journey. The master could not refloat the vessel without assistance and he notified the vessel owners, who declared general average and took steps to refloat the vessel by discharging a part of the cargo on board the Thor Traveller onto two other vessels, until the Thor Traveller could be refloated. In order to procure the lightening of the load on board the vessel, the owners'agents, Barwil Agencies Sdn Bhd ('Barwil Agencies') sought the assistance of one Sapu Lasi Enterprise Sdn Bhd ('Sapu Lasi') four days after the vessel had run aground. The vessel owners were advised of the availability of two barges and two tugboats to tow them. One of the available barges, the 'Hathaway', belonged to Fordeco Sdn Bhd ('the appellant'). The appellant agreed to hire Hathaway to the vessel owners. Terms of hire were given by Sapu Lasi on behalf of Fordeco to the vessel owners and the vessel owners, through Barwil Agencies, accepted those terms. The terms of such hire under the concluded agreement were for the provision of an additional barge, the Hathaway, to be towed by a tug boat 'Fordeco 37' to assist the grounded vessel by lightening the cargo on it, at a cost of RM300,000. The vessel owners agreed and accepted the terms unconditionally, including the exclusion of liability for damage or loss to the cargo.

Pursuant to the despatch of the Hathaway to the site of the stranded vessel, some 3,355 metric tons of rock phosphate cargo was discharged onto it. As a consequence of such lightening, the Thor Traveller was refloated and continued its journey towards Lahad Datu carrying the bulk of the cargo, less the quantities offloaded onto the two barges. To that extent, the bulk of the cargo was saved. The Hathaway proceeded to Lahad Datu and discharged their share of the cargo of rock phosphate. However, on discharge of the cargo on board the Hathaway, it was discovered that the cargo was wet and contaminated with pebbles, wood and other debris. Thus, the cargo was damaged. Subsequently, the cargo owner issued a letter of protest to the vessel owners complaining that the cargo was partially wet and that proper steps had not been undertaken either during the loading process or discharge process. They reserved their rights to hold the vessel owners and other interested parties responsible for any losses that might arise. Notwithstanding this, the general average claim was met and paid out by the cargo owners or their insurers without protest. The damaged cargo was eventually sold at salvage value for the sum of RM288,475.50. The original value of the 3,355 metric tons of cargo offloaded onto the Hathaway was RM778,863.25. Accordingly, the respondent claimed a loss of RM550,387.75 being the difference between the original value and the salvage value of that quantity

of rock phosphate in bulk. The insurers of the cargo compensated the respondent, for the damaged cargo and sued the salvor, the appellant, by way of subrogation. The claim was brought against Fordeco in bailment and/or the tort of negligence. The cargo owners maintained that Fordeco was the sub-bailee of the cargo and accordingly under a duty to deliver the cargo at Lahad Datu in the same condition in which it was first offloaded onto it. Fordeco denied liability on several grounds, including the defence that the operation it undertook was in the nature of a salvage operation rather than a contract for the carriage of goods. As a rescue operation, the primary focus of the hire was the lightening of the load on the vessel rather than a standard carriage of cargo to its port of discharge and accordingly, the standard of care to be applied was less stringent than in a contract entered into purely for the carriage of goods. The High Court determined that the contract between the cargo owners was one of bailment, within the context of carriage of goods and held that Fordeco was a sub-bailee in respect of the cargo it carried. The High Court rejected the contention that the nature of the contract was one of salvage and found Fordeco responsible for the loss and damage suffered by the cargo owner under both bailment and negligence. The Court of Appeal affirmed the decision of the High Court.

Leave was granted to Fordeco, pursuant to s. 96 of the Courts of Judicature Act 1964, to appeal to the Federal Court against the decision of the Court of Appeal on the following questions of law, *inter alia,* (i) where a vessel had run aground on the high seas and the owners of the vessel had declared general average in respect of the cargo, whether the rescue operation to save as much of the cargo as possible by other vessels hired for that purpose would, in maritime law, be classified as a salvage operation ('question 1') ; (ii) whether the duty of care over the safety of individual cargo on board a vessel that has run into distress had to be evaluated differently and in relation to the perils facing various parties engaged in the operation ('question 2'); and (iii) where a cargo owner was notified by the vessel owner of a salvage operation and did not object to the same, whether the cargo owner was bound by or deemed to have agreed to the terms and conditions of the salvage operation as agreed to by the vessel owner ('question 3').

Held (allowing appeal with costs)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) There was no dispute that general average was declared, accepted and that the cargo owner voluntarily contributed towards general average. The cargo owners agreed and accepted that there was a common jeopardy or misadventure that affected the common interest of the parties involved, warranting the incurring of expenditure beyond the agreed contractual duties. The expenditure incurred in the present case, which the cargo owner agreed to contribute to, was that involved in the hiring of the two barges and tug boats to lighten the load on the vessel. As general average had been declared, this meant that the voyage for the carriage of a bulk rock sulphate was put at risk by the

grounding of the vessel on the rocks, and an extraordinary expenditure was to be incurred to preserve all interests. Thus, the basis for the hire of the barge was primarily to assist in the refloatation of the vessel and only secondarily for the carriage of the discharged cargo to safety in Lahad Datu. As such, the contract was primarily one of rescue or salvage of the vessel, and necessarily the cargo which was on it. The trial judge gave no consideration to the express exclusion of liability clause which could not appear in a normal agreement contracted for the purpose of carriage of goods. These facts were material, if not central, in determining the nature of the contract. The trial judge erred in failing to consider the law to be applied in determining whether this was a contract of salvage or one of a regular carriage of goods. (paras 42, 43 & 64)

(1a) The trial judge erred in his construction and application of 'danger' for the purposes of determining whether there was a real danger. It was not necessary that the danger was imminent in the sense of a vessel sinking; it was sufficient if there was a state of difficulty and reasonable apprehension. Herein, it was sufficient that the ship had encountered damage or misfortune which might possibly expose her to destruction if the services were not rendered. The vessel was aground on coral rocks. If the barges and tug boats had not been hired, it would not have been possible to lighten the load and refloat the vessel, and this would inevitably have led to both the vessel and the cargo being damaged or lost altogether. The trial judge's characterisation of the Hathaway's part in the operation as amounting to a bailment contract as arose in a normal carriage of goods context was erroneous. (para 64)

(1b) The trial judge failed to give consideration to the test in law to ascertain whether it was a contract of towage and carriage of goods or one of salvage as stated in *The Aldora.* Firstly, the ship was in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made. Secondly, risks were run, or duties performed which could not reasonably be regarded as being within the scope of such engagements. It could not have been contemplated that the vessel would have to be refloated to save the vessel and the cargo and that to that end the barges and tug boats would be hired. The salvage situation remained in being so long as those factors continued to exist to some extent. The carriage of the cargo to safety, namely to Lahad Datu on the Hathaway, comprised an essential part of the entire salvage operation and could not be distinguished or separated from it. In these circumstances, it was evident that the situation that existed from 2 February 2006 until the vessel and the cargo were taken to safety on or around 18 February 2006, qualified as a salvage situation. Accordingly, the contract entered into between the vessel owners and Fordeco was a salvage

A contract rather than one of towage and carriage of goods in the ordinary sense. Thus, the answer to question 1 was in the affirmative (paras 64 & 66)

(2) Fordeco was called upon to provide barges to rescue a vessel grounded on coral rocks in the high seas by lightening the load on the vessel. B That was undertaken successfully, as a consequence of which the vessel and the bulk of the cargo was salved, unharmed. As the damage to a small part of the entire cargo resulted from an essentially successful salvage operation, the salvor, Fordeco was not, in the circumstances, negligent. Neither had it breached its duty of care as C a bailee, as its primary function was to rescue the imperilled vessel and the cargo on it, which was performed successfully. If the Hathaway had not proceeded to the site where the vessel was stranded to assist it, the vessel might have been grounded for a far lengthier period. This, in turn, could have had severe repercussions on the D entirety of the bulk cargo, rather than a small part of it. Therefore, where negligence is alleged in the context of an emergency salvage situation, the courts are slow to impute negligence to the salvor who has acted reasonably and in the interests of the parties who were in peril, particularly if the salvor's efforts had been successful. The E standard of care was different from that in a normal carriage of goods situation where the principles of bailment and negligence would be applied strictly. The trial judge had erred in law in applying the standard of care applicable in ordinary bailment cases. Question 2 was therefore answered in the affirmative. (paras 109-115)

F **(3)** The cargo owner was notified of the need to rescue the vessel as it had run aground, and that it was necessary to lighten the load to refloat the vessel. The correspondence between Barwil Agencies and Sapu Lasi was copied to the cargo owner's representative. The cargo owner responded to the mail by expressing surprise and stating that it would G be present through representatives for any cargo operations. Other than that, no other objection or protest emanated from them, until after the cargo had been unloaded in Lahad Datu. The vessel, if left stranded indefinitely, would inevitably have suffered damage. The loss of the entire vessel, and the cargo, was a possibility if the situation had been left unattended, given the adverse weather, the position of the H vessel on the rocks and the possibility of piracy. The only reasonable conclusion that may be drawn was that the salvage contract was necessary in order to safeguard the cargo on board the vessel. The conditions set out for the invoking of a situation of emergency necessitating salvage, and authorising the master as an agent of I necessity, were made out. The master or vessel owner's ultimate purpose was to save the interests of the parties in the best manner possible. The vessel owners had acted *bona fide* and reasonably in entering into the salvage contract. The answer to question 3 was, therefore, in the affirmative. (paras 80-87)

Bahasa Malaysia *Headnotes*

Pada 2 Februari 2006, sebuah kapal bernama 'Thor Traveller' ('kapal') yang sedang berlayar dari Ain Sukhna, Egypt ke Lahad Datu, Sabah, membawa kargo kira-kira 22,000 metrik tan batu fosfor, terdampar di lautan bergelora dan berombak, di luar pantai utara timur Sabah. Kapal itu terperangkap dalam batu karang dan terkandas. Kedua-dua kapal dan kargo berada dalam keadaan bahaya. Kargo dimiliki pemilik-pemilik kargo, PK Fertilizers ('responden'). Cara menyelamatkan kapal yang terkandas itu adalah dengan cara meringankannya, agar kapal boleh terapung semula dan meneruskan perjalanannya. Nakhoda tidak dapat membuatkan kapal itu terapung semula tanpa bantuan dan memaklumkan pemilik-pemilik kapal, yang mengisytiharkan purata umum dan mengambil langkah-langkah untuk membuat kapal itu terapung semula dengan melepaskan sebahagian kargo atas Thor Traveller kepada dua buah kapal lain, sehingga Thor Traveller boleh terapung semula. Untuk meringankan bebanan kapal tersebut, ejen-ejen pemilik, Barwil Agencies Sdn Bhd ('Barwil Agencies') meminta pertolongan Sapu Lasi Enterprise Sdn Bhd ('Sapu Lasi') empat hari selepas kapal tersebut terdampar. Pemilik-pemilik kapal tersebut dinasihatkan berkenaan ketersediaan dua tongkang dan dua kapal tunda untuk menunda mereka. Salah satu tongkang yang tersedia, 'Hathaway', milik Fordeco Sdn Bhd ('perayu'). Perayu bersetuju untuk menyewakan Hathaway kepada pemilik-pemilik kapal. Syarat-syarat sewaan diberi oleh Sapu Lasi bagi pihak Fordeco kepada pemilik-pemilik kapal dan pemilik-pemilik kapal, melalui Barwil Agencies, menerima syarat-syarat yang diberikan. Syarat-syarat sewaan bawah kontrak yang disempurnakan adalah untuk peruntukan tongkang, Hathaway, ditunda oleh kapal tunda 'Fordeco 37' untuk membantu kapal yang terdampar dengan meringankan kargo atasnya, pada kos RM300,000. Pemilik-pemilik kapal bersetuju dan menerima syarat-syarat, termasuk pengecualian liabiliti terhadap kerosakan atau kerugian pada kargo.

Berikutan perjalanan Hathaway pada kawasan tapak kapal itu terkandas, 3,355 metrik tan batu fosfor telah dilepaskan ke atasnya. Akibat peringanan itu, Thor Traveller terapung semula dan meneruskan perjalanannya ke Lahad Datu dengan membawa sebahagian besar kargo, kurang jumlah yang dilepaskan ke tongkang yang lain. Setakat itu, sebahagian besar kargo diselamatkan. Hathaway terus ke Lahad Datu untuk melepaskan bahagian kargo batu fosfur yang diangkutnya. Walau bagaimanapun, apabila kargo atas Hathaway dilepaskan, didapati kargo dalam keadaan basah dan tercemar dengan kerikil, kayu dan serpihan-serpihan lain. Oleh itu, kargo mengalami kerosakan. Pemilik kargo mengeluarkan surat protes terhadap pemilik-pemilik kapal dengan aduan sebahagian kargo adalah basah dan langkah-langkah yang sepatutnya telah gagal diambil sama ada semasa proses pemuatan atau pelepasan. Mereka menyatakan bahawa mereka mempunyai hak mendakwa pemilik-pemilik kapal dan pihak-pihak yang terlibat

bertanggungjawab untuk apa-apa kerugian yang timbul. Walau bagaimanapun, tuntutan purata umum telah diperolehi dan dibayarkan oleh pemilik-pemilik kargo atau penanggung insurans mereka tanpa protes. Kargo yang rosak kemudiannya dijual pada nilai menyelamatkan untuk jumlah RM288,475.50. Nilai asal 3,355 metrik tan batu fosfor kargo yang telah dilepaskan kepada Hathaway adalah RM778,863.25. Oleh itu, responden menuntut kerugian RM550,387.75 iaitu perbezaan antara nilai asal dan nilai menyelamatkan kuantiti batu fosfor. Penanggung insurans kargo telah membayar ganti rugi responden, untuk kargo yang rosak dan menyaman perayu, dengan cara subrogasi. Tuntutan dibawa terhadap Fordeco dalam bailmen dan/atau tort kecuaian. Pemilik-pemilik kargo mengekalkan bahawa Fordeco adalah sub-bailee kargo dan, oleh itu, mempunyai tanggungjawab menyerahkan kargo di Lahad Datu dalam keadaan yang sama apabila dilepaskan pada Hathaway. Fordeco menafikan liabiliti atas beberapa alasan, termasuk pembelaan bahawa operasi yang diambilnya adalah bersifat operasi menyelamatkan dan bukan kontrak pengangkutan barangan. Sebagai operasi menyelamatkan, fokus utama sewaan adalah untuk meringankan beban atas kapal tersebut dan bukan pengangkutan standard kargo kepada pelabuhan pelepasannya dan dengan itu, standard penjagaan yang dipakai kurang ketat daripada dalam kontrak yang dimasuki semata-mata untuk pengangkutan barang. Mahkamah Tinggi menentukan kontrak antara pemilik-pemilik kargo adalah satu kontrak bailmen, dalam konteks pengangkutan barangan dan memutuskan Fordeco adalah sub-bailee kargo yang diangkutnya. Mahkamah Tinggi menolak hujahan bahawa sifat kontrak adalah penyelamatan dan mendapati Fordeco bertanggungjawab atas kerugian dan kerosakan yang dialami pemilik kargo bawah kedua-dua bailmen dan kecuaian. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi.

Kebenaran diberikan kepada Fordeco, menurut s. 96 Akta Mahkamah Kehakiman 1964, untuk merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan atas persoalan-persoalan undang-undang berikut, antara lain (i) apabila sebuah kapal telah terdampar di lautan bergelora dan pemilik-pemilik kapal mengisytiharkan purata umum berkenaan kargo, sama ada operasi untuk menyelamatkan kargo oleh kapal-kapal lain yang disewakan untuk tujuan itu dari segi undang-undang maritim diklasifikasikan sebagai operasi penyelamatan ('soalan 1'); (ii) sama ada tanggungjawab berjaga-jaga atas keselamatan kargo atas kapal yang telah mengalami kesusahan perlu dinilai secara berbeza dan berhubungan bahaya yang dihadapi oleh pelbagai pihak yang terlibat dalam operasi ('soalan 2'); dan (iii) apabila pemilik kargo dimaklumkan pemilik kapal berkenaan operasi penyelamatan dan tidak membantahnya, sama ada pemilik kargo terikat atau bersetuju dengan terma-terma dan syarat-syarat operasi penyelamatan seperti yang disetujui oleh pemilik kapal. ('Soalan 3').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Tidak dipertikaikan bahawa purata umum diisytiharkan, diterima dan pemilik kargo telah secara sukarela menyumbang pada purata umum itu. Pemilik-pemilik kargo telah bersetuju dan menerima bahawa terdapat 'common jeopardy' atau kemalangan yang menjejaskan kepentingan bersama pihak-pihak yang terlibat, mewajarkan perbelanjaan melebihi kewajipan-kewajipan kontraktual yang disetujui. Perbelanjaan dalam kes ini, yang pemilik kargo telah bersetuju untuk memberi sumbangan, melibatkan sewaan dua tongkang dan dua kapal tunda untuk mengurangkan beban pada kapal. Oleh kerana purata umum telah diisytiharkan, ini bermaksud perjalanan pengangkutan barangan diletakkan dalam keadaan berisiko oleh kapal yang telah terdampar atas batu-batuan, dan satu perbelanjaan luar biasa perlu ditanggung untuk memelihara segala kepentingan. Oleh itu, dasar pertama sewaan tongkang adalah untuk membantu kapal tersebut terapung semula dan keduanya adalah untuk pengangkutan kargo yang dilepaskan dibawa dengan selamat ke Lahad Datu. Oleh itu, kontrak adalah terutamanya satu penyelamatan kapal, diikuti kargo di atasnya. Hakim bicara tidak memberi pertimbangan pada pengecualian nyata klausa liabiliti yang tidak akan wujud dalam perjanjian biasa yang dikontrakkan untuk pengangkutan barangan. Fakta-fakta ini adalah material dalam menentukan sifat kontrak. Hakim bicara terkhilaf apabila gagal mengambil kira undang-undang yang perlu dipakai dalam menentukan sama ada kontrak adalah satu kontrak penyelamatan atau satu kontrak pengangkutan barangan biasa.

(1a) Hakim bicara terkhilaf dalam tafsiran dan pemakaian 'bahaya' untuk menentukan sama ada terdapat situasi bahaya yang benar. Tidak perlu untuk keadaan bahaya berlaku seperti kapal tenggelam; adalah mencukupi jika terdapat keadaan kesukaran dan kebimbangan yang munasabah di sini, adalah memadai bahawa kapal telah mengalami kerosakan atau kemalangan yang mungkin mendedahkannya kepada kemusnahan jika perkhidmatan tidak diberikan. Kapal telah terdampar atas batu karang. Jika tongkang-tongkang dan kapal-kapal tunda tidak disewa, agak mustahil untuk meringankan beban dan membuatkan kapal terapung semula, dan ini akan membawa pada kedua-dua kapal dan kargo mengalami kerosakan atau hilang sama sekali. Pencirian hakim bicara berkenaan peranan yang dimainkan oleh Hathaway dalam operasi sebagai terangkum dalam kontrak bailmen yang timbul dalam konteks biasa pengangkutan barangan adalah salah.

(1b) Hakim bicara gagal memberikan pertimbangan kepada ujian undang-undang untuk menentukan sama ada ia adalah kontrak penundaan dan pengangkutan barangan atau kontrak penyelamatan seperti yang dinyatakan dalam *The Aldora*. Pertama sekali, kapal dalam keadaan membahayakan oleh keadaan-keadaan yang tidak munasabah telah dipertimbangkan oleh pihak-pihak apabila penundaan dibuat. Kedua, risiko-risiko berlaku, dan kewajipan-kewajipan dilakukan yang secara munasabah tidak dianggap sebagai terangkum dalam skop susunan sebegitu. Tidak boleh difikirkan bahawa kapal perlu terapung semula untuk menyelamatkan kapal dan kargo dan bahawa tongkang-tongkang dan kapal tunda-kapal tunda perlu disewa. Situasi penyelamatan kekal selagi faktor-faktor itu wujud. Pengangkutan kargo ke tempat yang selamat iaitu ke Lahad Datu atas Hathaway, merangkumi keseluruhan bahagian operasi penyelamatan dan tidak boleh dibezakan atau diasingkan darinya. Dalam keadaan ini, jelas sekali situasi yang wujud dari 2 Februari 2006 sehingga kapal dan kargo dibawa ke tempat yang selamat pada 18 Februari 2006, layak sebagai situasi penyelamatan. Oleh itu, kontrak yang dimeterai antara pemilik-pemilik kapal dan Fordeco adalah kontrak penyelamatan dan bukan kontrak penundaan dan pengangkutan barangan dari erti kata biasa. Dengan itu, jawapan soalan 1 adalah dijawab secara afirmatif.

(2) Fordeco dipanggil untuk menyediakan tongkang untuk menyelamatkan kapal yang terdampar atas batu karang di lautan bergelora dengan meringankan beban atas kapal. Itu berjaya dilaksanakan, akibat kapal dan sebahagian besar kargo telah diselamatkan. Oleh kerana kerosakan pada sebahagian kecil keseluruhan kargo adalah akibat daripada operasi penyelamatan yang berjaya dilaksanakan, penyelamat, Fordeco, tidak cuai dalam keadaan itu. Fordeco juga tidak melanggar kewajipan berjaga-jaganya sebagai bailee, kerana fungsi utamanya adalah untuk menyelamatkan kapal yang berada dalam keadaan bahaya dan kargo atasnya, yang telah berjaya dilakukan. Jika Hathaway tidak terus ke tapak di mana kapal itu terdampar untuk membantunya, kapal itu berkemungkinan akan terkandas untuk tempoh yang lebih lama. Ini seterusnya boleh membawa kesan buruk atas keseluruhan sebahagian besar kargo, bukan sebahagian kecil daripadanya. Oleh itu, apabila kecuaian didakwa dalam konteks situasi penyelamatan yang cemas, mahkamah enggan menyatakan terdapat kecuaian terhadap penyelamat yang telah bertindak secara munasabah dan dalam kepentingan pihak-pihak yang berada dalam keadaan bahaya, terutamanya jika percubaan-percubaan penyelamat telah berjaya. Standard berjaga-jaga berlainan daripada situasi pengangkutan barangan yang biasa di mana prinsip-prinsip bailmen dan kecuaian akan dipakai dengan ketat. Hakim bicara terkhilaf dari segi undang-undang dalam memakai standard berjaga-jaga yang diguna pakai dalam kes-kes bailmen biasa. Soalan 2 oleh itu dijawab secara afirmatif.

(3) Pemilik kargo dimaklumkan berkenaan keperluan menyelamatkan kapal yang telah terdampar, dan bahawa perlu untuk meringankan bebanan supaya kapal itu boleh terapung semula. Salinan surat menyurat antara Barwil Agencies dan Sapu Lasi diberikan kepada wakil pemilik kargo. Pemilik kargo telah menjawab dengan menyatakan kejutannya dan menyatakan kehadirannya melalui wakil-wakil untuk apa-apa operasi kargo. Selain dari itu, tiada bantahan atau protes daripada mereka, sehingga kargo telah diturunkan dari kapal di pelabuhan pelepasan di Lahad Datu. Kapal, jika dibiarkan terkandas, akan mengalami kerosakan. Kehilangan kapal dan kargo keseluruhannya adalah satu kemungkinan jika situasi ditinggalkan tanpa pengawasan, memandangkan cuaca buruk, kedudukan kapal atas batu-batuan dan kemungkinan aktiviti lanun. Hanya satu kesimpulan munasabah yang boleh dicapai iaitu bahawa satu kontrak penyelamatan diperlukan untuk melindungi kargo atas kapal itu. Syarat yang ditetapkan untuk penggunaan situasi kecemasan yang memerlukan penyelamatan, dan memberikan kuasa kepada nakhoda sebagai ejen keperluan, telah dibuat. Tujuan utama nakhoda atau pemilik kapal adalah untuk melindungi kepentingan pihak-pihak dengan cara yang terbaik. Pemilik-pemilik kapal telah bertindak *bona fide* dan secara munasabah dalam memeterai kontrak penyelamatan. Jawapan pada soalan 3 dengan itu dijawab secara afirmatif.

Case(s) referred to:

Alenquer [1955] 1 Lloyd's Rep 101 ***(refd)***
Anglo-Saxon Petroleum Co Ltd v. The Admiralty (The Delphinula) [1947] KB 794 ***(refd)***
Birkley v. Presgrave 1 East 220 ***(refd)***
Industrie Chimiche Italia Centrale And Cerealfin SA v. Alexander G. Tsavliris & Sons Maritime Co, Panchristo Shipping Co SA And Bula Shipping Corporation [1987] 1 Lloyd's Rep 508 ***(refd)***
The Aldora [1975] 1 Lloyd's Rep 617 ***(refd)***
The Charlotte [1848] 3 W Rob 68 ***(foll)***
The Gaetano and Maria [1882] 7 PD 137 ***(refd)***
The Industry [1835] 3 Hagg 203 ***(refd)***
The Pa Mar [1999] 1 Lloyd's Rep 338 ***(refd)***
The Phantom [1866] LR 1 A & E ***(foll)***
The St Blane [1974] 1 LLR 557 ***(refd)***
The Tojo Maru [1972] AC 242 ***(refd)***
The Troilus [1951] AC 820 ***(refd)***
Unique Mariner [1978] 1 Lloyd's Rep 438 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 101, 104
Courts of Judicature Act 1964, ss. 24, 96
Senior Courts Act 1981 [UK], s. 20(2)(j)

A *For the appellant - Cyrus Das & Tiong Jia Yi; M/s Szetu & Co*
For the respondent - Oon Thian Seng, Chieng Ho Ming & Kelvin Wong Kah Shing; M/s Lim Guan Sing & Co

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: S-02-2755-12-2013 (overruled).]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

C

[1] This appeal relates to the principles to be applied when determining a claim in negligence and bailment against a contract or salvor in the course of a rescue or salvage operation.

[2] When a vessel is stranded on the high seas and a contract for services
D is agreed upon by the vessel owner and a contractor/salvor, as a consequence of which the vessel is rescued and freed from its peril, does a cause of action in negligence or bailment lie against the contractor/salvor for damage to a portion of the cargo that was discharged to enable the vessel to be rescued?

[3] Does the fact that the vessel and the bulk of the cargo were saved by
E reason of the contractor's actions play a part in determining the liability of the contractor/salvor?

[4] Are there public policy considerations that come into play in determining this issue?

F **[5]** These are some of the issues that arose for consideration in the course of this appeal.

Salient Facts

[6] On 2 February 2006, a vessel named the "Thor Traveller" ('the
G vessel') ran aground in high seas that were rough, off the north east coast of Sabah near Kudat, but close to Philippine waters. The vessel was trapped on coral rocks. It was effectively stranded. The prevailing weather conditions were intemperate, in that there was rain and strong winds.

[7] The vessel was on a voyage from Ain Sukhna, Egypt to Lahad Datu,
H Sabah, carrying a cargo of about 22,000 metric tonnes of rock phosphate in bulk. By reason of having grounded on the coral rocks, both the vessel and the cargo were in peril. The cargo was owned by PK Fertilizers Sdn Bhd ('the cargo owner') who was the plaintiff in the High Court and the respondent in the Court of Appeal and before this court.

I **[8]** The mode of rescuing the stranded vessel was to lighten it, so that it could be refloated, and continue on its journey. The lightening of the vessel in turn meant that cargo had to be offloaded. It could not simply be jettisoned because that would give rise to marine pollution. The cargo had to be offloaded onto other vessels in order to lighten the load on the vessel.

[9] The master could not refloat the vessel without assistance. He notified the vessel owners. The owners declared general average and took steps to refloat the vessel. This was done by discharging a part of the cargo on board the Thor Traveller onto two other vessels, until the Thor Traveller could be refloated. These facts are not disputed.

[10] In order to procure the lightening of the load on board the vessel, the owners' agents, one Barwil Agencies Sdn Bhd ('Barwil Agencies'), sought the assistance of one Sapu Lasi Enterprise Sdn Bhd ('Sapu Lasi') on 6 February 2006, some four days after the vessel had run aground. Sapu Lasi is an enterprise whose business was the provision of tug boat services to assist the berthing of ships at ports.

[11] The vessel owners were advised of the availability of two barges and two tugboats (to tow them). This was the best option available given the fact that the vessel was stranded and could not simply be left there for weeks or months. Not many offers for assistance were available given the risk of piracy on these waters.

[12] The two available barges were named the 'Woodman 32' and the 'Hathaway'. The latter vessel, the 'Hathaway', belongs to Fordeco Sdn Bhd, the appellant in this appeal, who was the defendant in the High Court and the appellant in the Court of Appeal and before us ('Fordeco'). Fordeco are not professional salvors.

[13] Initially, the Woodman 32, a barge, was hired out to Barwil Agencies on behalf of the vessel owners and went out to the grounded vessel. Offloading operations commenced. However, it was found that the Woodman 32 was too small to assist fully, as the weight of cargo offloaded from the Thor Traveller onto the Woodman 32 was insufficient to lighten the load sufficiently to enable the Thor Traveller to be refloated.

[14] The vessel owners then requested for another barge, at which point the defendant, Fordeco, agreed to hire the barge called the Hathaway to the vessel owners. Terms of hire were given by the agent, Sapu Lasi on behalf of Fordeco, to the vessel owners on 8 February 2006. The vessel owners, through their agents, Barwil Agencies, accepted those terms on the same day.

[15] The terms of such hire under the concluded agreement were for the provision of an additional barge, the Hathaway, to be towed by a tug boat 'Fordeco 37', to assist the grounded vessel by lightening the cargo on it, at a cost of RM300,000. There was a clear exclusion of liability term in respect of the cargo, as follows:

> … Barge owner will not be responsible/liable for any cargo loss/shortage or damage of cargo during voyage.

A **[16]** The vessel owners agreed and accepted the terms unconditionally, including the exclusion of liability for damage or loss to the cargo. However, there is nothing in these exchanges to indicate that the cargo owner was accorded a copy of these letters or the terms of hire finally concluded between the vessel owner's agents and the defendant.

B **[17]** The cargo owners appear to have become aware of the misadventure of the vessel and consequently, their cargo, from an email of 6 February 2006 issued by their representative to the vessel owner's agents, Barwil Agencies. In this email of 6 February, there is reference to a conversation between the vessel owner's agents and the plaintiff's representative (This email was prior C to the conclusion of the agreement for the provision of the additional barge, the Hathaway).

[18] The cargo owner's representative wrote to the vessel owner's agents to state that as consignee of the cargo they wanted to be kept fully informed of the status of the cargo. They expressed their surprise that there was a move D by the vessel owner to discharge the cargo on the high seas without notifying them.

[19] They further stated that surveyors would represent the plaintiff, as consignee, if any cargo operation was conducted. This email was not made, issued to or made available to the defendant. E

[20] Pursuant to the despatch of the Hathaway to the site of the stranded vessel, some 3,355 metric tons of rock phosphate cargo was discharged onto it (Approximately 655.91 metric tons of cargo had been earlier discharged onto the Woodman 32). As a consequence of such lightening, the Thor F Traveller was refloated and continued its journey towards Lahad Datu carrying the bulk of the cargo, less the quantities offloaded onto the two barges. The bulk of the cargo was eventually discharged with no complaint. To that extent, the bulk of the cargo was saved, despite the misadventure. The Hathaway (and the Woodman 32) proceeded to Lahad Datu and discharged their share of the cargo of rock phosphate. G

[21] On discharge of the cargo on board the Hathaway, it was discovered that the cargo was wet and contaminated with pebbles, wood and other debris. The cargo owner's surveyors were present during the discharge of the cargo at Lahad Datu. For Fordeco, the defendant, it is contended that no H effort was made by the cargo owners to separate the wet cargo from the dry cargo by way of sieving. Instead the admixed cargo was transported to the cargo owner's warehouse where subsequent rain water there damaged the cargo further.

[22] On 19 February the cargo owner issued a letter of protest to the vessel I owners complaining that the cargo was partially wet and that proper steps had not been undertaken either during the loading process or discharge process. They reserved their rights to hold the vessel owners and other interested parties responsible for any losses that might arise.

[23] Notwithstanding this the general average claim was met and paid out by the cargo owners or their insurers without protest. A

[24] The damaged cargo was eventually sold at salvage value for the sum of RM288,475.50. The original value of the 3,355 metric tons of cargo offloaded onto the Hathaway was, according to the plaintiff, RM778,863.25. Accordingly the plaintiff claimed a loss of RM550,387.75, being the difference between the original value and the salvage value of that quantity of rock phosphate in bulk. B

[25] The insurers of the cargo compensated the cargo owner, ie, the plaintiff/respondent, for the damaged cargo and sued the salvor, ie, the defendant/appellant by way of subrogation. The claim was brought solely against the owners of the Hathaway. C

[26] The claim was brought against Fordeco in bailment and/or the tort of negligence. The cargo owners maintained that Fordeco was the sub-bailee of the cargo and accordingly under a duty to deliver the cargo at Lahad Datu in the same condition in which it was first offloaded onto it. Fordeco denied liability on several grounds, including the defence that the operation it undertook was in the nature of a salvage operation rather than a contract for the carriage of goods. As a rescue operation, the primary focus of the hire was the lightening of the load on the vessel rather than a standard carriage of cargo to its port of discharge. Accordingly the standards of care to be applied were less stringent than in a contract entered into purely for the carriage of goods. D E

The Decision Of The High Court

[27] The High Court determined that the contract between the cargo owners was one of bailment, within the context of a carriage of goods. More specifically, it was held that Fordeco was a sub-bailee in respect of the cargo it carried. Reliance was placed on s. 101 of the Contracts Act 1950 and the concept of sub-bailment. F

[28] The learned High Court Judge expressly rejected the contention that the nature of the contract was one of salvage, rather than a normal carriage of goods. In so concluding he found that: G

(i) salvage was not pleaded;

(ii) even if it had been, the situation was not one of rescue nor the contract one of salvage, because there was no evidence that the vessel was in danger as a result of the weather conditions or grounding. There was also no evidence that the vessel was in imminent danger of sinking nor evidence that she required salvage; H

I

A (iii) while the vessel was grounded on 2 February 2006, it was only six days later that the Hathaway and the Fordeco 37 were hired to lighten the vessel. Matters would have been dealt with far greater urgency if indeed there was a situation of emergency or fear of piracy in Philippine waters; and

B (iv) therefore the situation was one of bailment (presumably as understood under a contract of carriage of goods) and the ordinary principles of negligence were applicable. There was a duty on the part of Fordeco to have taken reasonable measures to care for the cargo; to protect it from rain and sea water spray, such as a man of ordinary prudence would take for his own goods of the same bulk, quantity and value;

C (v) by failing to do so, Fordeco had failed to discharge its duty of care under s. 104 of the Contracts Act 1950.

[29] Accordingly the High Court Judge found Fordeco responsible for the loss and damage suffered by the cargo owner under both bailment and
D negligence.

[30] The Court of Appeal affirmed the decision of the High Court. There is no separate judgment from the court.

[31] On 10 May 2016 leave was granted to Fordeco pursuant to s. 96 of the Courts of Judicature Act 1964 to appeal to the Federal Court against the
E decision of the Court of Appeal given on 20 May 2015 on the following questions of law:

(i) Where a vessel had run aground on the high seas and the owners of the vessel had declared general average in respect of the cargo, whether the
F rescue operation to save so much of the cargo as possible by other vessels hired for that purpose would in maritime law be classified as a salvage operation?;

(ii) Whether the duty of care over the safety of individual cargo on board a vessel that has run into distress has to be evaluated differently and in
G relation to the perils facing various parties engaged in the operation?;

(iii) Where a cargo owner is notified by the vessel owner of a salvage operation and does not object to the same, whether the cargo owner is bound by or deemed to have agreed to the terms and conditions of the salvage operation as agreed to by the vessel owner?; and

H (iv) Where under the maritime principle of 'general average' when one of the parties to a sea venture had suffered a loss the other parties are obliged to take on a proportionate share of the loss, whether it is wrong to seek to recover from the defendant only?

I

Analysis And Conclusions On The Four Questions Of Law

Question (i): Where A Vessel Had Run Aground In The High Seas And The Owners Of The Vessel Had Declared General Average In Respect Of The Cargo, Whether The Rescue Operation To Save So Much Of The Cargo As Possible By Other Vessels Hired For That Purpose Would In Maritime Law Be Classified As A Salvage Operation?

[32] The first question of law essentially questions whether in a situation where a vessel had run aground on the high seas and the owners of the vessel had declared general average, any rescue operations undertaken by other vessels to save the vessel and the cargo would, in maritime law be classifiable as salvage operations. This in turn requires a consideration of the law of general average and salvage.

General Average

[33] How is general average defined?

[34] "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure".

[35] This is the definition which has remained unchanged since 1924 where it was formulated for the New York-Antwerp Rules (see Lowndes and Rudolf, *The Law of General Average and The York-Antwerp Rules,* 13th edn, published by Sweet & Maxwell 2008). In the 1801 case of *Birkley v. Presgrave* 1 East 220, sanction under the common law was given to the principle of general average:

> … All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average and must be borne proportionably by all who are interested.

[36] This definition has been treated as the highest authority.

[37] Put another way, as a matter of principle, general average applies where the common adventure is put at risk and an interest of it is sacrificed, or an extraordinary expenditure is incurred in order to preserve that property and other interests involved in the maritime adventure. The expenditure or sacrifice is the general average act and must be voluntary and reasonable. The result of such a declaration is an entitlement to a general average contribution by the person whose property has been sacrificed or the expenditure incurred, against the other interests that are saved (see *Modern Maritime Law and Risk Management* by Alexandra Mandaraka-Sheppard, 2nd edn, published by Informa 2009).

[38] Examples of general average acts include jettisoning part of the cargo or ship's stores, cutting way masts or cables, engaging salvage services, paying money to secure the vessel's release from detention, incurring damage to property belonging to third parties and consequent tortious liability, the expense of ship repairs, reconditioning cargo and other instances, far too numerous to justify a full recital.

[39] The subject matter of general average incudes all the interests of the common adventure, which are at risk. Such interests are physical, namely the ship, the cargo, the bunkers, stores and personal effects.

[40] In the context of our present case it refers to:

(a) the fact of general average being declared when the vessel was grounded on coral rocks and the costs;

(b) It required a sacrifice to preserve the vessel and its cargo which could not be left stranded on the rocks indefinitely where these interests would be subject to the vagaries of the weather, the stated risk of piracy and ultimately a loss of one or both; and

(c) In this context, the expenditure incurred in hiring the barges and tug boats to lighten the load on the vessel such that it could be moved from the rocks and refloated, was properly shared between the interested parties. This meant that the owners of the vessel and cargo owner had to contribute towards the costs so incurred, to make good the loss sustained by one of them in seeking to save the vessel and cargo for the benefit of both parties.

[41] It is important to bear in mind that the shipowner's obligation to perform the voyage under the contract of affreightment is to ensure delivery of the cargo safely to the port of destination upon payment of freight. Contribution for general average, when incurred for the common safety, does not absolve the parties from their contractual rights and obligations. Only when the sacrifice or expenditure is beyond the contractual duties, can general average be declared and claimed.

[42] In the present case there is no dispute that general average was declared, accepted and that the cargo owner voluntarily contributed towards general average. It follows therefore that the cargo owners agreed and accepted that there was a common jeopardy or misadventure that affected the common interest of the parties involved, warranting the incurring of expenditure beyond the agreed contractual duties.

[43] The expenditure incurred in the present case, which the cargo owner agreed to contribute to, was that involved in the hiring of the two barges and tug boats to lighten the load on the vessel.

[44] It is important to highlight the fact of the declaration of general average and to comprehend its effect, as it comprises a background fact which is a relevant factor for the purposes of determining the situation at hand when the contract for the hire of the barges and tug boats was undertaken by the vessel owners. In other words was the contract for the Hathaway and the Fordeco 37 a salvage contract or simply a contract for the towing or carriage of goods? The nature of the contract will in turn determine the duties and obligations owed by Fordeco not only to the vessel owner, but, as is the issue in the instant case, to a third party, namely the cargo owner.

[45] The learned judge, apart from acknowledging and accepting the fact of general average, failed to give any further consideration to this material fact in the chronology of events leading up to the discharge of cargo and carriage of the same to Lahad Datu.

Salvage

[46] The next issue that falls for consideration is whether, general average having been declared, it would follow definitively that the contract for the rescue and refloatation of the vessel through the discharge and transport of the cargo on the Hathaway, was one of salvage, rather than towage or carriage of goods.

The Law On Salvage

[47] Salvage has been defined as a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor (see Kennedy & Rose, *Law of Salvage*, 6th edn, published by Sweet & Maxwell 2002). Having said that, two points require clarification. The first is that this does not lay down a complete definition of salvage. The term should not be limited by a definition. Second, this definition describes salvage as it subsisted in earlier times. In more modern times, salvage is rendered more commonly by salvors under contract.

[48] Malaysia has not ratified the Salvage Convention 1989. Therefore the common law is applicable by the admiralty court in determining salvage claims which fall within its jurisdiction (see the Senior Courts Act 1981 (UK), s. 20(2)(j) by virtue of s. 24 of the Courts of Judicature Act 1964).

[49] When then is a contract termed one of salvage rather than one for the towage and carriage of goods? There are four elements that are characteristic of a contract of salvage, as opposed to a contract for the provision of towage, pilotage or the carriage of goods:

A (i) there should be recognised subject matter;

(ii) the object of salvage should be in danger at sea;

(iii) the salvors must be volunteers; and

(iv) there must be success by either preserving or contributing to preserving
B the property in danger.

[50] A vessel would comprise recognised subject matter, as would cargo.

[51] Of importance is that there must be some real danger as a consequence of which the property comprising the subject of salvage is exposed to damage
C or destruction. An apprehension of danger is sufficient.

Danger

[52] In *The Phantom* [1866] LR 1 A & E at p. 60, it was held by Dr Lushington that:

D > … it is not necessary that there should be absolute danger in order to constitute salvage service; It is sufficient if there is a state of difficulty and reasonable apprehension.

[53] And in *The Charlotte* [1848] 3 W Rob 68, it was said:

E > … According to the principles which are recognised in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.
F

[54] Even a future or contingent danger may qualify, as borne out by *The Troilus* [1951] AC 820. There the ship was carrying cargo from Australia to Liverpool when she fractured her tail shaft and dropped her propeller in the Indian Ocean. The vessel was towed to Aden where she anchored. This
G undisputedly, amounted to salvage services. But in Aden there were no facilities for repairs nor for storage of the cargo. She was then towed to the UK given that repairs and storage would have incurred considerable delay and expense.

[55] The cargo owners contended that this latter leg of the journey
H constituted ocean towage rather than salvage, as the ship was in no imminent danger as she had reached safety upon anchoring in Aden. The court disagreed, holding that although the ship and cargo were in physical safety at Aden the services in question were salvage services. The master of a damaged ship had a duty to preserve the ship and cargo as best he could and
I bring them to their destination as cheaply and efficiently as possible.

[56] Ultimately therefore, the existence or otherwise of a danger is a question of fact. The master's decision that the ship is in danger must be a reasonable decision. If unreasonable, then the element of danger would be in issue and the requirements for a claim of salvage would not be met.

[57] In the instant case, the barges and tug boats were required to lighten the load so as to refloat the vessel and secondarily carry the discharged cargo to safety in Lahad Datu. Does this comprise a towage contract for the carriage of the discharged cargo or a salvage service?

[58] The test to be applied was laid down in *The Aldora* [1975] 1 Lloyd's Rep 617. In that case, it had been standard practice for ships of the size approximating that of The Aldora to be met by a pilot and tugs to assist in navigation to their berths. As a result of a miscommunication about the time of arrival of the vessel, the tug and boats were not at the buoy when the vessel arrived. The master decided to proceed out to sea again and in doing so ran aground on a sandbank outside the dredged channel leading to the harbour. Four tugs were engaged to help to refloat her. With the combined effort of the tugs and the ship's own engine and assistance from the pilot, the vessel was refloated. She was then taken up the channel and into harbour by the tugs and the pilot. The tugowners, crew and pilot all claimed salvage remuneration from the vessel owners. However the vessel owners contended that while the refloating of the vessel constituted salvage, the subsequent service of assisting the ship back to the harbour was towage.

[59] It was held that the refloatation of the vessel comprised salvage services. However having refloated her and returned her to the dredged channel, the ship was no longer in any unexpected danger and the responsibilities of the pilot and the tugs were exactly the same as those to be undertaken under their original duties and so did not comprise salvage services.

Salvage Service Or Carriage Of Goods?

[60] The test for a claim to salvage therefore necessitates the fulfilment of the four elements stipulated at the outset. When dealing with a towage contract, as is the contention of the respondent here in relation to the discharged cargo carried on the Hathaway, the test was affirmed in *The Aldora (above)* by Brandon J:

(i) firstly, the ship is in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made;

(ii) secondly, risks are run, or duties performed which could not reasonably be regarded as being within the scope of such engagements; and

(iii) The salvage situation remains in being so long as those factors continue to exist to some extent at least.

[61] Returning to the question at hand, was the contract between the vessel owners and Fordeco one of salvage or towage and the carriage of goods ie, the transport of the cargo to Lahad Datu? It is to be noted that the cargo owner is not privy to the contract. However, the nature of the contract between the vessel owner and Fordeco in relation to the Hathaway is important as this in turn will regulate the nature of the duties owed by Fordeco to the cargo owner. If it is a normal contract for the carriage of goods where the cargo owner is a sub-bailee, the duties imposed on Fordeco would be demonstrably higher than if the situation and contract was one of salvage, where the duties owed by Fordeco to the cargo owner as sub-bailee would be different.

Nature Of The Contract Between Fordeco And The Vessel Owner

[62] Therefore it is important that the nature of the contract be determined first. This in turn has to be determined by a consideration of the totality of the factors in play at the time when the contract was entered into.

[63] In the High Court the learned judge did not, with respect, give much consideration to the issue as framed, stating that there was no merit in the contention that the situation, and hence the contract, was one of salvage rather than a normal towage and carriage of goods situation. It was held that:

(i) firstly Fordeco had not pleaded such a defence and therefore could not take the point;

(ii) Even if Fordeco did so, His Lordship could not agree that the cargo was loaded onto the Hathaway as part of a salvage operation or in a situation of 'emergency' (danger). This was because there was no evidence that the vessel was in danger as a result of the adverse weather conditions or grounding.

(iii) There was no evidence that the vessel was in imminent danger of sinking or that she required salvage assistance. This in turn, was by reason of the delay between the date the ship ran aground on 2 February 2006, and the date when the Hathaway was hired which was some six days later, on 8 February 2006. (The fact that the lapse in time was due to the fact that the Woodman 32 was not sufficiently large to take on sufficient amounts of the cargo to lighten the vessel was ignored entirely); and

(iv) If indeed the situation was one of danger or there was a fear of piracy steps would have been taken immediately ie, on the same day to procure salvage tugs and barges.

[64] In so concluding the learned High Court Judge erred for the following reasons:

(i) His Lordship was factually wrong when he stated that salvage was not pleaded. A perusal of the defence discloses that at para. 8, Fordeco pleaded as follows: The instruction from the owners or charterers of the vessel and/or their agent, Barwil Agencies Sdn Bhd, was to salvage the vessel as it was stuck on corals near the Philippines and it was urgent.

At para. 2 the defendant pleaded that: … It was requested by Sapu Lasi Enterprise of Teluk Sepangar, Menggatal, Kota Kinabalu, Sabah ('Sapu Lasi') to provide an additional barge to help lighten the vessel after initial attempts to lighten the vessel using a third party barge proved unsuccessful.

While the pleadings could have been drafted with more care and skill, it is clear enough that the vessel owners instructed or sought a salvage operation/contract, rather than a tow and carriage contract.

The learned judge misapprehended this fact. As a consequence, he erroneously concluded that the salvage defence was not available to Fordeco;

(ii) Nonetheless the learned judge went on to consider the possibility of the situation being one of salvage. However His Lordship failed to consider the entirety of the relevant facts in coming to his conclusion. More particularly His Lordship failed to consider that:

(a) general average had been declared, meaning that the voyage for the carriage of the bulk rock sulphate was put at risk by the grounding of the vessel on the rocks, and an extraordinary expenditure was to be incurred to preserve all interests. Such expenditure was to be shared proportionately between the parties;

(b) significantly the plaintiff did not challenge this declaration, but accepted the same and made the required contribution without protest, as pointed out earlier in para. 23. It is reiterated that this amounted to an agreement to pay for the expenditure incurred in hiring the two barges and tug boats to rescue the vessel and cargo which were stranded on the rocks with no hope of continuing on its journey unless it could be refloated; and

(c) the learned judge failed to realise or evaluate this significant factor when determining that the contract was one of towage and ultimately of bailment in the context of a normal carriage of goods situation. This amounts to an error of fact and consequently law, in relation to the evaluation of a fundamental evidential issue;

(iii) The learned judge also failed to give any consideration to the exchange of correspondence leading up to the hire of the Hathaway and the Fordeco. If he had done so, he would have noted that the basis for the hire of the barge was primarily to assist in the refloatation of the vessel and only secondarily for the carriage of the discharged cargo to safety in Lahad Datu. As such the contract was primarily one of rescue or salvage of the vessel, and necessarily the cargo which was on it. His Lordship also gave no consideration to the express exclusion of liability clause which could not appear in a normal agreement contracted for the

purpose of carriage of goods. These facts were material, if not central, in determining the nature of the contract. As such the learned judge erred in ignoring or failing to give any consideration to highly relevant facts in determining the issue before him.

(iv) The learned judge erred in law in failing to consider the law to be applied in determining whether this was a contract of salvage or one of a regular carriage of goods. Further, His Lordship, with respect, erred in his construction and application of 'danger' for the purposes of determining whether there was a real danger. As pointed out in paras. 50-51 above, in both *The Phantom* and *The Charlotte*, Dr Lushington expressly explained that it was not necessary that the danger was imminent in the sense of a vessel sinking, or being imperilled by the weather conditions or piracy. It is sufficient if there is a state of difficulty and reasonable apprehension.

It was sufficient that the ship had encountered damage or misfortune which might possibly expose her to destruction if the services were not rendered.

In the instant case, the vessel was aground on coral rocks. If the barges and tug boats had not been hired, it would not have been possible to lighten the load and refloat the vessel. This would inevitably have led to both the vessel and the cargo being damaged or lost altogether. The learned judge failed to recognise or properly evaluate the situation. His characterisation of the Hathaway's part in the operation, as amounting to a bailment contract as arises in a normal carriage of goods context is, with respect erroneous.

(v) The learned judge also failed to give consideration to the test in law to ascertain whether it was a contract of towage and carriage of goods or one of salvage as stated by Brandon J in *The Aldora* (above), as set out in paras. 56-58 above:

(a) firstly, the ship is in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made. This limb of the test was met because it was not within the reasonable contemplation of the parties that the vessel in the course of carrying the cargo would run aground and be left stranded on coral rock;

(b) secondly, risks are run, or duties performed which could not reasonably be regarded as being within the scope of such engagements. Again, it could not have been contemplated that the vessel would have to be refloated to save the vessel and the cargo and that to that end the barges and tug boats would be hired;

(c) the salvage situation remains in being so long as those factors continue to exist to some extent at least. In the instant case the carriage of the cargo to safety, namely to Lahad Datu on the Hathaway, comprised an essential part of the entire salvage operation and cannot be distinguished or separated from it; and

(d) In these circumstances it is evident that the situation that existed from 2 February 2006 until the vessel and the cargo were taken to safety on or around 18 February 2006, qualifies as a salvage situation. Accordingly, the contract entered into between the vessel owners and Fordeco was a salvage contract rather than one of towage and carriage of goods in the ordinary sense.

[65] From the foregoing, we conclude that the learned judge erred in holding that the situation was not one of salvage and in treating the defendant as a sub-bailee of the cargo within the context of a normal carriage of goods situation, rather than within the context of a salvage contract, for the provision of services to rescue the imperilled vessel and cargo.

Answer To Question 1

[66] Our answer to question 1 is in the affirmative. However it should be noted that it is not the correct approach to assume that where a vessel had run aground in the high seas and the owners had declared general average in respect of the cargo, the rescue operation to save the cargo by the hiring of other vessels would automatically be classified a salvage operation. Each case must turn on its facts. More significantly, it is necessary to apply the correct law to the factual matrix in each case to ascertain whether an operation undertaken after the declaration of general average does, or does not, amount to a salvage operation.

[67] As has been said above, the test as laid down in *The Aldora (above)* ought to be undertaken to determine whether the operation amounts to one of salvage or one of towage and the carriage of goods. Prior to that, in determining whether the situation is indeed one of salvage, it is necessary to consider and apply the tests properly identifying 'danger' as set out for example in *The Phantom (above)* and *The Charlotte (above).*

[68] As this was not undertaken in the instant case and there was a misapprehension of the pleadings coupled with a failure to give any or proper consideration to the factual matrix as a whole, the learned Judge erroneously arrived at the conclusion that this was not a salvage situation when in fact it was. Accordingly the contract entered into between the vessel owners and the defendant, Fordeco, was one for the provision of salvage services, rather than of towage and carriage of the goods.

A *Question 3: Where A Cargo Owner Is Notified By The Vessel Owner Of A Salvage Operation And Does Not Object To The Same, Whether The Cargo Owner Is Bound By Or Deemed To Have Agreed To The Terms And Conditions Of The Salvage Operation As Agreed To By The Vessel Owner?*

B **[69]** This query relates to the authority of the vessel owner (usually through its agent, the master) to bind the owners of the cargo carried on board the vessel. As Malaysia has not ratified the 1989 Salvage Convention, the issue falls to be determined under common law under the principles of agency, and more particularly, agency of necessity.

C **[70]** In the instant case neither the vessel owners nor the master had express authority to bind the cargo owner. The facts disclose that the cargo owner was notified sometime after the vessel ran aground. On 6 February 2006 the cargo owner's representative wrote to the vessel owner's representative, stating that they were surprised that their cargo was being discharged and despatched on the high seas and demanded to be present during any cargo D operations. There was no other correspondence. The cargo owners were not present when the vessel was lightened by the discharge of part of the cargo onto the barges. Their agents, the surveyors were present at the point of unloading in Lahad Datu, when the cargo was brought to safety. That is the point at which the salvage operation ceased.

E **[71]** Under the principles of agency, in the absence of express authority, the master is not ordinarily the agent of the owners of cargo laden on board his ship, and in general, has no authority to make contracts on behalf of the owners of the cargo. However, the doctrine of the agent of necessity was widely used in practice, arising from the master's duty to safeguard the F interests in goods in his possession during an emergency. Such authority of necessity entitled him to bind the cargo owners to the terms of the salvage contract (see *Kennedy & Rose*'s textbook, Law of Salvage, above).

[72] In agency one of the key characteristics of an agent is to affect the legal G position of the principal as regards third parties. In a salvage situation such as the instant case, the master of the ship acts as agent of the owners of the properties that require rescue. That would include the cargo. The master authorises the salvage contract with a view to salvaging the vessel and the cargo. Therefore the issue for consideration is whether the salvage contract so created binds the owners of the cargo.

H **Agent Of Necessity**

[73] Agency of necessity arises by operation of law in certain circumstances where the person, here the master, is faced with an emergency in which the property or interests of another person are in imminent jeopardy I and it becomes necessary in order to preserve the property to act for that person without his express authority. The rationale supporting the existence of authority on behalf of the master or vessel owner to contract on behalf of the cargo owner in situations of emergency or necessity was considered in

The Gaetano and Maria [1882] 7 PD 137 by Brett J. He stated that it arises from the necessity of things; from the obligation of the shipowner and the master to carry the goods from one place to its destination. In the course of such a journey, it may well be inevitable that the master may have no credit and have no means, and for the safety of all concerned and for the purposes of achieving the ultimate goal of delivery of the goods, that he be authorised to hypothecate not only the vessel but also the cargo. In other words he was authorised to deal with the cargo in the ultimate interests of all the parties.

[74] The power of the master did not arise from the bill of lading nor the charter party because it could be invoked even where neither agreement existed. It arose, it was held, from the contract of maritime carriage by the shipment of goods on board a ship for the purpose of being carried from one place to another and it comes into play from the point in time when the goods are put on board for such a purpose.

[75] This issue came up for consideration in the case of *Industrie Chimiche Italia Centrale And Cerealfin SA v. Alexander G Tsavliris & Sons Maritime Co, Panchristo Shipping Co SA And Bula Shipping Corporation (The "Choko Star")* [1987] 1 Lloyd's Rep. 508. A demise chartered vessel was carrying a cargo of soya beans from Argentina. It ran aground in the river Parana. The master entered into a Lloyd's Open Form 1980 contract with European salvors to refloat the vessel, very much like the instant case. Security was provided and the salvors' claim against the shipowners was settled by agreement. The cargo owners objected that the master had no authority to engage the salvors on their behalf and went into arbitration under protest. The issue of the master's authority to contract on behalf of the cargo owners went to trial. It is relevant to note that it was reasonably practicable to communicate with the cargo owners. Sheen J held that the contract of carriage gave the master implied authority to contract with salvors, when he was acting in circumstances of emergency or necessity. Such authority could not be overridden by the cargo owners.

[76] This first instance judgement in *The Choko Star* was reversed by the Court of Appeal which took a strict view of the application of the principles of agency. The master, it was held, had no implied authority to do so. However there was a compromise in that it was acknowledged that the master would have such authority on the basis of agency of necessity where the requirements of the doctrine of necessity were satisfied.

[77] The four elements required for such an agency to arise were stated in *The Choko Star (above)* [1990] 1 Lloyd's Rep 516 (per Lord Justice Slade at 525):

(i) It is necessary to take salvage assistance, and;

(ii) It is not reasonably practicable to communicate with the cargo-owners or to obtain their instructions; and

A (iii) The master or vessel owner act *bona fide* in the interests of the cargo; and

(iv) It is reasonable for the master or vessel owner to enter into the particular contract.

[78] This test was adopted and applied in *The Pa Mar* [1999] 1 Lloyd's Rep
B 338 ('*The Pa Mar*').

[79] In the *Unique Mariner* [1978] 1 Lloyd's Rep 438 the court upheld the implied authority of the master to accept salvage services without communicating with the cargo owner for instructions, on the grounds that it was his duty to take measures necessary for the safety of his ship. His implied
C authority would have extended to allow for this.

The Present Case

[80] In the present case the cargo owner was notified of the need to rescue the vessel as it had run aground, and that it was necessary to lighten the load
D to refloat the vessel. The correspondence between Barwil Agencies and Sapu Lasi was copied to the cargo owner's representative.

[81] The cargo owner responded to the mail by expressing surprise and stating that it would be present through representatives for any cargo operations. Other than that, no other objection or protest emanated from
E them, until after the cargo had been unloaded in Lahad Datu. Even if the cargo owners had objected to the entry into the salvage contract or specific terms in the agreement, there was no option but to offload the cargo to lighten the vessel, so as to rescue it and the cargo from its stranded position.

[82] The vessel, if left stranded indefinitely, would inevitably have suffered
F damage. The loss of the entire vessel and thereby the cargo was a possibility if the situation had been left unattended, given the adverse weather, the position of the vessel on the rocks and the possibility of piracy.

[83] With respect to the terms of the salvage contract, it is a fact that the exclusion clause was not to the benefit of the cargo owners. However, when
G this factor is balanced against the reality that the bulk of the rock phosphate remained on the vessel, and needed to be salved, the only reasonable conclusion that may be drawn is that the salvage contract was necessary in order to safeguard the cargo on board the vessel.

H **[84]** Even if the lesser quantity of cargo offloaded onto the barges had perished, the bulk of the cargo would be saved. In all these circumstances it would appear that the conditions set out for the invoking of a situation of emergency necessitating salvage, and authorising the master as an agent of necessity were made out.

I **[85]** It was a situation where salvage assistance was necessary. It was not reasonably practicable to procure the consent of the cargo owners to all the terms and conditions because it was important that an agreement be reached to save the vessel and secure the ultimate object of delivery of the cargo or

the bulk of it to a place of safety. Arguing over the acceptability of the exclusion clause would have delayed matters unnecessarily and exposed both the vessel and the cargo to further risk. The master or vessel owner's ultimate purpose was to save the interests of the parties in the best manner possible. On an objective basis, given the circumstances, we are of the considered view that the vessel owners acted *bona fide* and reasonably in entering into the salvage contract.

[86] The foregoing analysis is diametrically opposed to the findings of the learned judge in the High Court. However, as stated earlier, His Lordship failed to give any, or any adequate consideration to either the factual matrix relating to the circumstances within which the vessel owner acted, in order to rescue the ship and therefore the cargo on it. Neither did His Lordship examine, consider or apply the law in relation to circumstances which might give rise to the invocation of the doctrine of necessity or its application to the facts of the instant case. In failing to do so he erred, in that he failed to consider significant factual and legal matters which warranted close scrutiny and consideration.

[87] Therefore we answer question 3 in the affirmative. However further clarification is necessary. If the situation prevailing at the time is one of an emergency, where both vessel and cargo are in jeopardy, necessitating salvage assistance, and the remaining elements of the test for an agent of necessity as set out in *The Choko Star (above)* are met, then the master or vessel owner is impliedly authorised in law to bind the cargo owner in relation to the salvage contract entered into by the vessel owner and the salvor. Put another way, the salvage contract entered into by the master or vessel owner in such circumstances as meet the test set out in *The Choko Star (above)* and applied in *The Pa Mar (above)*, bind the interests of the cargo owner.

[88] This must be a question of fact in each case. There can be no single proposition of law to fit the various complex factual situations that arise in each case.

Question 2: Whether The Duty Of Care Over The Safety Of Individual Cargo On Board A Vessel That Has Run Into Distress Has To Be Evaluated Differently And In Relation To The Perils Facing Various Parties Engaged In The Operation?

[89] This question relates to the standard of care to be applied when assessing the salvor's 'negligence' in the course of carrying out its duties. In this case the learned High Court Judge applied the ordinary principles of the law of bailment and negligence. He concluded that Fordeco had not taken sufficient care in protecting the cargo from 'wetting' when it was conveyed to a place of safety in Lahad Datu. The test applied was that of 'ordinary prudence'. His Lordship held that Fordeco ought to have known and recognised that:

A (i) the weather conditions were adverse and there was rain;

(ii) the Hathaway had to carry the bulk cargo of rock phosphate over a long distance; and

(iii) that the cargo could therefore be lost or damaged by sea water or rain because the barge had no hatches.

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[90] As such, it was concluded that Fordeco had failed to take the necessary measures to protect the cargo from rain and sea water, such as an ordinary man of prudence would have done under the same circumstances in relation to his own goods of the same bulk, quantity and value.

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[91] Under the law of bailment, the learned judge applied s. 104 of the Contracts Act 1950, finding that Fordeco had not discharged its duty of care.

[92] Fordeco's complaint is that the learned judge erred in law in treating this contract as an ordinary contract for the carriage of goods where the standard of care to be applied, whether in negligence or bailment would approximate to that of a reasonable man who was similarly circumstanced, who would, with diligence, have taken the necessary measures to utilise a vessel with the requisite equipment to safely transport the bulk cargo to its destination. This would include a vessel which contained hatches or other storage facilities to safeguard the cargo from rain and sea water.

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What is The Correct Test To be Applied?

[93] The question that arises for consideration is whether the learned judge applied the correct test for the standard of care applicable in the situation under which Fordeco undertook to carry out its duties. We have concluded earlier on in the judgment, unlike the learned judge, that the contract between the vessel owner and Fordeco was one of salvage rather than one for the normal carriage of goods. Therefore the question that follows is whether the standard of care applicable in a normal carriage of goods situation is applicable in a salvage situation where the primary focus of the salvor, Fordeco here, was to rescue the stranded vessel and not primarily to carry a portion of the bulk cargo to safety.

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[94] We have previously also stated that admiralty law in this jurisdiction, by virtue of s. 24 of the Courts of Judicature Act 1964, is that as is applied in the United Kingdom, now under the Senior Courts Act 1981. To that extent the position under the English common law is applicable in the present context, as Malaysia has neither ratified nor enacted the Salvage Convention 1989. The latter provides for the issue of the negligence of salvors and their liability.

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[95] For many years the English courts held that the negligence of salvors who responded to a vessel in distress in the high seas at risk to themselves should be judged leniently. The courts were then generally reluctant to award damages against salvors as their services were provided voluntarily. There was in place a policy whereby salvors by nature of the provision of their

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services were treated more leniently than carriers in a normal carriage of goods situation where the applicable standards of care in negligence and bailment would prevail. This became a matter of public policy.

[96] However this reluctance to award damages or even allow for such a claim changed over time and in the twentieth century the English courts became more open to the award of damages to the owner of salved property for a salvor's negligence. In *Anglo-Saxon Petroleum Co Ltd v. The Admiralty (The Delphinula)* [1947] KB 794 (CA); [1947] 80 LIL Rep 459, the English Court of Appeal held that if the salvor is guilty of misconduct, the reduction in value of the salved property would be taken into account in assessing the award due to the salvor. Not only that, an independent counterclaim or cross-claim for damages could be made against the salvor.

[97] In the *Alenquer* [1955] 1 Lloyd's Rep 101, no salvage award was made but the damage claim had to be paid in full by the salvor. Notwithstanding this the learned judge placed reliance on the general policy in relation to salvors as stated in Kennedy & Rose's textbook *Law of Salvage* (above) where the learned authors explained that the court, in considering whether a salvor has shown such negligence as ought to affect the assessment of his award, or is guilty of an error of judgment, should take a lenient view and consider favourably circumstances which exonerate the salvor such as a request for help, the suddenness of the emergency or the inability to find other assistance.

[98] The leading case on point is *The Tojo Maru* [1972] AC 242 where the House of Lords affirmed that a claim in damages will lie against salvors for their negligence by way of a counterclaim independently of merely taking into account their negligence in assessing the remuneration payable to them.

[99] The facts are that the Tojo Maru collided with an Italian ship in the Persian Gulf. The Tojo Maru entered into a salvage agreement under the Lloyd's Open Form, 'no cure no pay' basis, with the respondent salvors. During the collision a large crack appeared on the hull of the ship. This crack had to be covered by way of a large plate to be bolted to the hull. This in turn had to be done by firing bolts to the hull. An adjoining tank however had to be made gas-free first for safety reasons. The chief diver of the salvor, contrary to instructions he had received, fired a bolt through the shell plating of the vessel. This resulted in an explosion which caused extensive damage and a fire on the vessel. Additional assistance was obtained to put out the fire. The vessel was repaired and when declared seaworthy was towed to Singapore and Kobe to be repaired.

[100] In these circumstances the salvors claimed an award in salvage arbitration and the vessel owners counterclaimed for damages suffered due to the salvor's negligence. The arbitrator found that the salvors were negligent and the owners were entitled to recover damages. The issue of whether the owners were entitled to a counterclaim and whether the salvors

could limit their liability was referred to appeal. The High Court agreed with the arbitrator that the owners were entitled to counterclaim. The Court of Appeal disagreed, stating that the normal common law principles on negligence were not applicable but that of the maritime law of salvage. The concern was that the application of strict common law principles would discourage salvors from undertaking difficult salvage operations.

[101] This précis does little to convey the significant legal propositions that were argued in meticulous detail and ought to be read in full.

[102] The House of Lords however reversed the decision of the Court of Appeal on the issue of whether the owners were entitled to counterclaim damages. They held that the owners were entitled to counterclaim. The leading judgments (of Lord Reid and Lord Diplock) relied on the established principles of negligence of professionals at common law, rejecting any special rule on the basis of 'more good than harm' as had been established in maritime law.

[103] It is important to note that the salvors did not dispute the finding by the arbitrator of negligence on their part. The essential points that may be gleaned from the judgment of Lord Reid are that:

(a) courts look leniently to negligence of salvors which causes damage to the property in danger during salvage operations and will judge their efforts as a whole;

(b) a claim for damages will lie where a vessel is lost due to a salvor's negligence. This must depend on the facts of each individual case; and

(c) the same standards of care are applicable in adjudging the conduct of professional salvors, as those applicable to other professionals, save that public policy issues applicable to maritime salvage carried out in an emergency will be taken into account by the court. On the facts of the *Tojo Maru*, there was no emergency and the damage was caused several weeks later, during the repair of the salved property.

[104] A few points of note are that it was acknowledged and accepted that public policy even now encourages professional salvors to maintain salvage vessels in a wide variety of situations. It was further accepted that just as courts are very slow to hold that errors of judgment in emergencies amount to negligence, so too are courts slow to impute negligence to salvors.

[105] The point in issue before the court was whether the salvors, who had accepted that they were negligent, could nonetheless maintain that the vessel owners had no cause of action against them in damages. This contention was premised on the rule of 'more good than harm' occasioned by salvors, and that as a matter of public policy, they should not be held liable for harm arising from their having acted so as to rescue a vessel in peril.

[106] It is also of relevance to note that in most cases where damages are sought against salvors in negligence, the damage occurs to the salved vessel, rather than cargo interests.

[107] Another case of relevance is *The St Blane* [1974] 1 LLR 557 at 560 where Brandon J made an observation about the general approach that the court ought to adopt when faced with charges of negligence against persons who render or try to render assistance at sea:

> … As to this it is well established that the Court takes a lenient view of the conduct of salvors and would-be salvors, and is slow to find that those who try their best, in good faith, to save life or property in peril at sea, make mistakes or errors of judgment in doing so, have been guilty of negligence …
>
> This principle of the lenient approach to mistakes is an important one. It derives from the basic policy of the law relating to salvage services, which is always to encourage, rather than discourage the rendering of such services.

[108] Apart from the *Tojo Maru* which similarly supports this principle of public policy, this approach has been adopted in Singapore (see *The Law on Carriage of Goods by Sea* by Tan Lee Meng, 3rd edn, Academy Publishing 2018).

[109] In the instant case, the defendant, Fordeco, was not a professional salvage services provider. It was called upon to provide barges to rescue a vessel grounded on coral rocks in the high seas by lightening the load on the vessel. That was undertaken successfully, as a consequence of which the vessel and the bulk of the cargo was salved, unharmed. A small portion of the bulk cargo was damaged. However this arose as part of the inherent operation of salvage. It was not an independent and distinguishable damage arising outside of the salvage operation. This warrants the court considering the entirety of the salvage operation in determining whether liability lies against the salvor, Fordeco, for negligence in relation to a small part of the cargo which was damaged by rain and sea spray.

[110] The learned judge did not consider the matter in this light, notwithstanding that the factual matrix was before him. He treated the discharge operations, which were to enable the re-floatation of the vessel, as a normal carriage of goods situation, where the common law principles of negligence and the principles in bailment would apply. This was a clear error of fact and law.

[111] If His Lordship had considered the entirety of the facts and the law in full, he would have concluded that as the damage to a small part of the entire cargo resulted from an essentially successful salvage operation, the salvor, Fordeco was not, in the circumstances, negligent. Neither had it breached its duty of care as a bailee, as its primary function was to rescue the imperilled vessel and the cargo on it, which was performed successfully. If the Hathaway had not proceeded to the site where the vessel was stranded to

assist it, the vessel might have been grounded for a far lengthier period. This in turn could have had severe repercussions on the entirety of the bulk cargo, rather than a small part of it. This too, the learned judge failed to consider.

[112] We would therefore concur with learned counsel for the appellant that the learned judge erred in law in applying the standard of care applicable in ordinary bailment cases. The predicament the vessel was in was a far cry from the hire of a barge for the transportation of cargo to a destination.

[113] By virtue of the reasoning in the *Tojo Maru* and *The St Blane* [1974] 1 LLR 557, we would answer question 2 in the affirmative. However it is reiterated that each case must be premised on its particular facts. If the acts of negligence are separable or independent and distinguishable from the salvage operation it might well be the case that the ordinary principles of negligence would apply. In other words, the first issue that has to be determined is whether the totality of the circumstances amounted to a salvage operation and whether the damage was sustained as an integral part of the salvage.

[114] It is useful to reiterate the policy underlying the concept of salvage. Salvage is a mixed concept of private law and public policy. In *The Industry* [1835] 3 Hagg 203, at p. 204 the public policy underlying salvage and salvage reward was considered (per Sir John Nicholl):

> … there are various facts for consideration – the state of the weather, the degree of damage and danger as to ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and when all these things are considered there is still another principle – to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity.

[115] Therefore where negligence is alleged in the context of an emergency salvage situation, the courts are slow to impute negligence to the salvor who has acted reasonably and in the interests of the parties who were in peril, particularly if the salvor's efforts have been successful, as is the case here. In other words, the standard of care is different from that in a normal carriage of goods situation where the principles of bailment and negligence would be applied strictly.

Question 4: Where Under The Maritime Principle Of 'General Average' When One Of The Parties To A Sea Venture Had Suffered A Loss The Other Parties Are Obliged To Take On A Proportionate Share Of The Loss, Whether It Is Wrong To Seek Recovery From One Defendant Only?

[116] It appears to us that this question relates primarily to the principles of 'general average', which do not fall directly for consideration in this appeal. The fact of general average being declared and the plaintiff having contributed to the same is not in dispute. Accordingly it is not necessary to answer this question, as it has no bearing to the present appeal.

Conclusion

[117] We therefore answer Questions 1, 3 and 2 in the affirmative subject to our statements and commentary as set out in the body of the judgment. We decline to answer Question 4 as it is not relevant to this appeal. Having so answered three of the four questions of law framed, and having considered the entirety of the facts and the law, we are of the unanimous view that this appeal should be, and is hereby allowed with costs for the reasons set out above.

[118] The judgment and order of the High Court is set aside. The respondent's claim against the appellant is dismissed with costs. The sum of RM849,590.82 which has been paid by the appellant to the respondent is to be refunded to the appellant. The appellant is granted costs of RM100,000 subject to allocatur. The deposit is refunded.